

STRAITS SETTLEMENTS LAW REPORTS.

PUBLISHED BY AUTHORITY.

[ORIGINAL CIVIL JURISDICTION]

BARRETT-LENNARD, J.

August 2, 1921.

THE EASTERN SHIPPING CO., LTD. OF
PENANG Plaintiffs.

vs.

HIS MAJESTY'S ATTORNEY GENERAL FOR
THE STRAITS SETTLEMENTS.. Defendant.
[SINGAPORE SUIT No. 250 of 1919]

Crown Suits—prerogative of Crown—power to requisition ships—compensation—tort—Imperial Orders in Council dated October 26, 1896 and March 21, 1916—practice—rejection of Petition of Right—proceedings by ordinary action.

The plaintiffs, the owners of certain ships which were expropriated by the Government of the Straits Settlements on October 5, 1918, claimed compensation from the Crown for the use of their ships and for loss and damage occasioned by such requisition. They also claimed a declaration that they were entitled to have such compensation assessed under the direction of the Court. These vessels were seized in pursuance of a notice signed by the Colonial Secretary in purported exercise of the powers vested in the Governor of the Colony by virtue of Clause 6 of the Order in Council of 1896. By clause 4 of Order in Council of 1916 the Governor can delegate the power of requisition in favour of the Naval or Military authorities. The plaintiffs filed a Petition of Right claiming compensation as aforesaid but the Governor refused to grant his fiat. During the pendency of this action the Government in March, 1920, appointed a Board to inquire into the matter and assess compensation. The plaintiffs, however, objected to the constitution of this Board.

Held, that the Crown having consistently refused until the institution of the present proceedings to recognise any duty of perfect obligation towards them, the plaintiffs were justified in bringing the action.

Held further, that the plaintiffs' ships never were expropriated in exercise of any powers conferred upon the Governor.

Held also, that the notice given by the Colonial Secretary was not a notice contemplated by the Orders in Council. It was incumbent upon the Governor to pursue strictly the authority given to him.

That the Crown having deliberately elected to waive any possible title traceable to the Orders in Council, could not ignore that election so as to force the plaintiffs before a Board to the constitution of which they objected.

ACTION tried before Barrett-Lennard, J. in Singapore. The pleadings were as follows:—

STATEMENT OF CLAIM.

1. The plaintiffs were a Limited Company incorporated and registered in Penang and were at all material times the owners (*inter alia*) of the following nine steamers:—

S.S. Pungah	S.S. Perak	S.S. Perlis
S.S. Jin Ho	S.S. Renong	S.S. Ghirbi
S.S. Omapere	S.S. Pin Seng	S.S. Trang

2. Previously to the 4th October, 1918 negotiations took place between the Honourable the Colonial Secretary and the Shipping Committee of the Straits Settlements on the one side and the plaintiffs on the other side for the charter by the Government of the Straits Settlements of the said nine steamers. In the course of such negotiations the plaintiffs were requested to sign charter-parties in the form known as the "Liner Requisition Charter-Party." The plaintiffs did not agree to the rate of hire offered for the said steamers and refused to sign any charter-parties.

3. The said Shipping Committee was appointed on the 18th April, 1918 (Notification No. 469) by His Excellency the Governor in pursuance of a power conferred upon him by a Regulation dated the 17th April, 1918 (Notification No. 468) under the Imperial Order in Council of the 26th October, 1896 as amended by the Order of His Majesty in Council of the 21st March, 1916 which were brought into operation in the Colony by Proclamations dated the 6th August, 1914 and the 20th May, 1916 respectively.

4. The said Shipping Committee was so appointed for the purpose of advising and assisting the Agent of the Shipping Controller in the East, if and when so required, in respect of all matters relating to the chartering and requisitioning of ships in the Colony by the Shipping Controller the Admiralty or the Government of the Colony and for the purpose of seeing that the terms and conditions set out in any charter-party entered into by the Government and that all orders made by the Government in relation to the chartering or requisitioning of ships are carried out and obeyed.

The negotiations referred to above culminated in a conference which took place on the 4th and 5th days of October 1918 at Penang between the Honourable the Colonial Secretary and the Directors of the plaintiff Company.

The plaintiff's contention was that the said steamers could only be requisitioned under the said Orders in Council of the 26th October, 1896 and the 21st March, 1916 and that under such orders the plaintiffs were entitled to have the compensation due to them assessed by a Board under section 12 of the former Order.

The contention of the Honourable the Colonial Secretary was that the said steamers could be requisitioned under the powers conferred by the Regulations made under the Defence of the Realm Acts and that the rate of hire could be fixed without reference to the plaintiffs. The plaintiffs on the other hand contended that the Defence of the Realm Acts and the Regulations made thereunder did not extend and had no application to this Colony.

At no time during the said negotiations did the Honourable the Colonial Secretary claim or purport to be acting by virtue of or to rely upon the Royal Prerogative.

On the 5th October, 1918 after the conclusion of the said conference the plaintiffs through their Managing Director received a letter from the Honourable the Colonial Secretary in the following terms:—

Resident Councillor's Office,
Penang, 5th October, 1918.

Sir,

In view of the refusal of your Directors to sign the Charter-Party under the "Liner Requisition Scheme" I have to give you notice that as from the 7th instant your vessels:

S.S. Pungah	S.S. Perak	S.S. Perlis
S.S. Jin Ho	S.S. Benong	S.S. Trang
S.S. Omapere	S.S. Pin Seng	S.S. Ghirbi

will be removed from your management and in future be run and managed by Mr. Quah Beng Kee.

2. You will, therefore, hand over all necessary documents and supply all information to that gentleman, as he may require.

I have the honour to be,

Sir,

Your obedient servant,

Sd. F. S. JAMES,

Colonial Secretary,
Straits Settlements.

The Managing Director,

The Eastern Shipping Company, Limited,
PENANG.

On the 7th October the plaintiffs' solicitors wrote to the Honourable the Colonial Secretary in the following terms:—

Penang, 7th October, 1918.

Sir,

We have the honour to refer to your letter of the 5th instant, addressed to the Managing Director of the Eastern Shipping Company, Limited, and sent from the Resident Councillor's Office Penang.

2. Our clients, the Company, take your letter to be a notice of requisition of the nine steamers mentioned.

3. We shall be much obliged if you will kindly inform us by whom the steamers are requisitioned, whether by the Straits Settlements Government, the Shipping Controller in the East, the Straits Settlements Shipping Committee or by whom.

4. We should also be very glad to know under what Act of Parliament, Order in Council or Ordinance the requisition has been made and what compensation it is proposed to give our clients.

5. As you are aware our clients' contention is that their steamers can only be requisitioned under the Orders in Council proclaimed on the 6th August 1914 and the 20th May, 1916 and that they are entitled to compensation under section 12 of the former Order.

We have the honour to be,

Sir,

Your obedient servants,

Sd. PRESGRAVE & MATTHEWS.

The Honourable the Colonial Secretary,
SINGAPORE.

On the 23rd October, 1918 the plaintiffs' solicitors wrote to the Honourable the Colonial Secretary asking for a reply to their letter of but no reply had ever been received by the plaintiffs.

On the 7th October, 1918 the said steamers with the exception of the S.S. Omapere were delivered by the plaintiffs to Quah Beng Kee in accordance with the letter quoted in paragraph 6 hereof.

The plaintiffs on the 7th October, 1918 also tendered the S.S. Omapere to the said Quah Beng Kee but he refused to accept her on the ground that she was awaiting repair and survey.

The S.S. Omapere was eventually delivered to the said Quah Beng Kee on the 25th October, 1918 but was redelivered to the plaintiffs on the 27th November, 1918.

The requisition of the said steamers was not necessary for the defence of this Colony nor of any other part of His Majesty's Dominions.

After the requisition, with the exception of the S.S. Perak which made a single trip to Rangoon for the purpose of carrying foodstuffs, none of the said steamers was diverted from her usual and customary run, and save as aforesaid the steamers were during the period of requisition employed for the same purposes of trade as if they had continued to be under the control of the plaintiffs.

On or about the 10th December, 1918 the plaintiffs preferred a Petition of Right under the Crown Suits Ordinance XV of 1876 to His Excellency the Governor of the Straits Settlements praying for certain relief in respect of the requisitioning of the said steamers including a declaration that they were entitled to compensation therefor.

No answer was received to the said Petition of Right for more than two months but ultimately the plaintiffs received a letter addressed to their solicitors and dated the 22nd February, 1919 in the following terms:—

Colonial Secretary's Office,
Singapore,
22nd February, 1919.

No. 11013/1918.

Gentlemen,

I am directed to inform you that, as your clients' ships have been requisitioned by the Crown by virtue of the Royal Prerogative and not under the Defence Order in Council 1896, your clients are not entitled to compensation to be assessed by a Board to be appointed under the said Order in Council, and indeed are not legally entitled to any compensation at all. The Crown however is willing to pay "ex gratia" to your clients a sum by way of compensation based on the rates of hire payable to those owners who have signed the Liner Requisition Charter-Party.

2. Under the circumstances the Governor in Council does not see his way to indorse as prayed your clients' Petition of Right.

I have the honour to be,

Gentlemen,

Your obedient servant,

Sd. W. GEORGE MAXWELL,

Acting Colonial Secretary,

Straits Settlements.

Messrs. Presgrave & Matthews,

PENANG.

The plaintiffs on the 25th February, 1919 replied through their solicitors as follows:—
Sir,

Eastern Shipping Company Requisition,
No. 11013/1918.

We have the honour to acknowledge the receipt of your letter of the 22nd instant upon which we have taken our clients' instructions.

2. Our clients decline to accept the compensation offered to them which they consider entirely inadequate. Also they claim compensation as a matter of right and not *ex gratia*.

3. At the Conference in Penang on the 4th and 5th October 1918 it was contended by the Colonial Secretary that the steamers could be requisitioned by virtue of the powers given by the Regulations under the Defence of the Realm Acts.

4. By our letter of the 7th October 1918 we enquired by whom the steamers were requisitioned and by virtue of what powers. To this letter we received no reply.

5. Our clients' Petition of Right was sent in on the 10th December, 1918.

6. We now learn from your letter under reply that the steamers were requisitioned not under the Defence of the Realm Acts but under the Royal Prerogative, but it would scarcely appear from the facts above stated that the exercise of the Prerogative was intended when the steamers were requisitioned.

7. Our clients protest against the refusal of the fiat to the Petition of the Right which amounts in their view to a denial of justice. They also protest against the delay of over two months in answering the Petition.

8. Under the circumstances our clients have no option but to seek justice from the Supreme Court by means of writ against the Attorney-General and we are to-day instructing our Singapore Agents, Messrs. Braddell Brothers, to issue the writ forthwith.

We have the honour to be,

Sir,

Your obedient servants,

Sd. PRESGRAVE & MATTHEWS.

The Honourable the Colonial Secretary,

SINGAPORE.

The said steamers have since been re-delivered to the plaintiffs. The following are the respective dates of redelivery.

- | | |
|------------------------|------------------|
| 1. S.S. Pungah | 1st April, 1919 |
| 1. S.S. Ghirbi | 1st April, 1919 |
| 3. S.S. Perlis | 2nd April, 1919 |
| 4. S.S. Pin Seng | 4th April, 1919 |
| 5. S.S. Jin Ho | 4th April, 1919 |
| 6. S.S. Trang | 4th April, 1919 |
| 7. S.S. Perak | 12th April, 1919 |
| 8. S.S. Renong | 16th April, 1919 |

As stated in paragraph 11 hereof the S.S. Omaperé had already on the 27th November 1918 been redelivered to the plaintiffs.

Since the said steamers were taken over by the Government the plaintiffs have received no payment, remuneration or compensation whatsoever in respect thereof, and have suffered heavy loss and damage; on the other hand the Government has made large profits by the running of the said steamers.

The loss and damage which the plaintiffs have suffered by reason of the requisitioning of their ships as aforesaid includes not only loss of profits but other loss and damage particulars of which are as follows:—

- (a) Between the 5th October, 1918 and April, 1919 the plaintiffs at the request of the Government through their Agent, the said Quah Beng Kee, supplied large quantities of stores for use on board the requisitioned steamers and there was in addition a large quantity of coal in the bunkers of the said steamers at the time of the requisition the whole of which was taken over and used by the Government. There is now due to the plaintiffs for the said stores and bunker coal the sum of \$43,661.74. Although the plaintiffs have frequently requested the Government through its Agent the said Quah Beng Kee for payment of the amount from

time to time owing for stores and bunker coal supplied as aforesaid no part of the said sum has yet been paid, and the plaintiffs have been informed by the said Quah Beng Kee that he is unable to obtain the sanction of the Shipping Committee for the payment of the bills.

- (b) In addition to the coal which was in the bunkers of the said steamers at the time of requisition the plaintiffs had a stock of 10,000 tons of coal or thereabouts which they had laid in for use on the said steamers and for which they had paid cash, at the rate of \$53/- per ton. The said coal was not requisitioned by the Government and the plaintiffs being deprived of their steamers were unable to use it, except a small portion thereof which was required for the S.S. Omapere. Nor were the plaintiffs able to sell it. At or soon after the date of the return of the said steamers to the plaintiffs the market price of coal had fallen from \$53 to \$35 per ton, but owing to deterioration in the quality of the said coal it would be impossible now to obtain the full market price for it. The plaintiffs will submit that they are entitled to compensation in respect of the said coal at the rate of \$20 per ton on the ground that by reason of the action of the Government they have been deprived of the use of it, and that they are further entitled to compensation for the loss in quality of the said coal.

The plaintiffs claim:—

- (1) A declaration that the plaintiffs are entitled to compensation from the Crown for the use of the said steamers and for the loss and damage occasioned by the requisition thereof from the 5th October, 1918 to the respective dates on which the same were delivered to the plaintiffs.
- (2) A declaration that the plaintiffs are entitled to have such compensation assessed in such manner and by such person or persons as the Court directs.
- (3) Costs.
- (4) Such further or other relief as this Honourable Court may think proper.

Delivered this 19th day of September, 1919
by Braddell Bros., Solicitors for the Plaintiffs.

DEFENCE AND COUNTERCLAIM.

1. The defendant admits the allegation in paragraph 1 of the Statement of Claim.
2. As to paragraph 2 of the Statement of Claim the defendant says that by a Circular

dated 9th February, 1918 signed by the Colonial Secretary the plaintiffs (amongst several other shipowners) were notified that it was the intention of the Shipping Controller to place under "Liner Requisition" all local shipping under the British flag and that the rates of hire were under consideration and would be communicated later and generally as to the proposed terms of the intended requisition. By a further letter dated 16th April, 1918 signed by the Colonial Secretary and addressed to the plaintiffs the vessels mentioned in paragraph 1 of the Statement of Claim (except the s.s. "Pungah" and s.s. "Perlis" which were omitted by oversight) were requisitioned on behalf of the Imperial Government as from the 1st May, 1918 the form of requisition (as stated in such letter) being that known as the "Liner Requisition" as broadly explained in the Colonial Secretary's Circular letter dated 9th February, 1918 and as more fully set out in a Charter-party then about to be forwarded to the plaintiffs. By another letter dated 30th April, 1918 signed by the Colonial Secretary the s.s. "Perlis" and s.s. "Pungah" were similarly requisitioned as from 1st May, 1918. The defendant will refer to the original Circular and letters when produced at the trial for their terms.

3. Further as to paragraph 2 of the Statement of Claim the defendant says that the negotiations which took place between the Colonial Secretary and the plaintiffs were negotiations relative to the requisition of the vessels and admits that in the result the plaintiffs refused to sign the forms of "Liner Requisition" Charter-party. The defendant will refer to such forms of Charter-party at the trial for their terms so far as material. The refusal of the plaintiffs to sign the Charter-party forms, occurred in the month of October 1918 and previously thereto the plaintiffs did not object to but on the contrary acquiesced in the requisitioning of their vessels.

4. The defendant admits the allegations in paragraphs 3 and 4 of the Statement of Claim.

5. As to paragraph 5 of the Statement of Claim the defendant says that the plaintiffs' vessels were requisitioned as hereinbefore pleaded under the powers in that behalf contained in the New Ministries and Secretaries Act 1916 and the regulations referred to in section 6 of that Act and in particular Regulation 39 BBB of the Defence of the Realm Regulations. In the alternative the vessels were requisitioned in exercise of His Majesty's Royal Prerogative. The defendant further says that in connection with the requisition the Colonial Secretary throughout acted by virtue of all powers statutory or otherwise (including the Royal Prerogative) enabling it to be lawfully made and the defendant does not admit the allegation to the contrary contained in paragraph 5.

6. The defendant admits the allegations in paragraphs 6, 7, 8, 9, 10 and 11 of the Statement of Claim.

7. As to paragraph 12 of the Statement of Claim the defendant does not admit that the requisition of the steamers was unnecessary for the defence of the Colony or of any other part of His Majesty's Dominions. The requisition of the plaintiffs' vessels was part of a general scheme of requisition extending to all local shipping in the Colony and also in Hongkong. The circumstances of the time were such that a general scheme of requisition was necessary in order to make the best use of such shipping and the scheme was (or was thought by the Shipping Controller to be) the best method for providing and maintaining an efficient supply of shipping. Alternatively the scheme was necessary for the defence of the Colony and/or His Majesty's Empire.

8. The allegations in paragraph 12 of the Statement of Claim are not admitted.

9. The defendant admits the allegations in paragraphs 13, 14, 15 and 16 of the Statement of Claim except the dates of re-delivery in paragraph 16 which are not admitted.

10. As to paragraph 17 of the Statement of Claim the defendant says that the Government have been at all material times and still are ready and willing to compensate the plaintiffs by allowing them rates of hire in accordance with the "Liner Requisition" scheme but the plaintiffs have throughout declined to accept compensation upon that footing. The defendant does not admit that the plaintiffs have suffered any loss or damage in respect of which relief can be claimed in this action or at all or that the Government has made profits as alleged or at all.

11. As to paragraph 18 of the Statement of Claim the defendant says:—

As to (a) thereof:—The defendant admits that certain stores and bunker coal were taken over and used as alleged but not that the sum of \$43,661.74 is the correct amount due therefor. The defendant submits that the question of the amount properly due ought to be dealt with as part of the account sought by the counterclaim herein.

As to (b) thereof:—The defendant does not admit any of the allegations or submissions in such sub-paragraph except that the steamers when requisitioned had certain coal in their bunkers and that it was not requisitioned.

12. The defendant will object in point of law that the Statement of Claim discloses no ground of action against him and that this action is not maintainable.

13. Except as expressly admitted the defendant denies each and every allegation in the Statement of Claim.

COUNTERCLAIM.

14. The defendant repeats the allegation in paragraph 2 of the defence and says that as from 1st May, 1918 until the dates of redelivery the plaintiffs' nine vessels were under "Liner Requisition" as pleaded in the defence and says that in respect of the period from 1st May, 1918 until delivery of the vessels to Quah Beng Kee as mentioned in the Statement of Claim the profits arising from their trading were notwithstanding the requisition received by the plaintiffs who now refuse to account therefor.

The defendant counterclaims:—

(a) An account of the working of the steamers for the period last mentioned and of all receipts and expenditure in connection therewith and of all profits made.

(b) Payment of what shall be found due upon the footing that the steamers were under "Liner Requisition" during such period the defendant submitting to credit the plaintiffs with the proper amount for the stores and coal referred to in paragraph 18 (a) of the Statement of Claim and with the proper amount of compensation in accordance with paragraph 10 of the Defence.

Delivered this 22nd day of November 1919 by Drew and Napier, Solicitors for the defendant.

REPLY AND DEFENCE TO COUNTERCLAIM.

(As amended by leave of Order of Court dated April 12th, 1920.)

1. The plaintiffs admit receiving the Circular and the two letters referred to in paragraph 2 of the Defence and Counterclaim. They also received in or about the month of April 1918 a printed form of Charter party.

The said Charter-party was expressed to be made between the plaintiffs and the Honourable the Colonial Secretary acting for and on behalf of the Government of the Straits Settlements and the Shipping Controller was not named as a party thereto.

The said letters (dated respectively the 16th and 30th April, 1918) contained no mention of the Shipping Controller.

2. As to paragraph 3 of the Defence and Counterclaim the Plaintiffs deny that the negotiations related to the requisition of their vessels as alleged.

They say that the said negotiations related solely to the chartering of the said vessels and to the rate of hire.

They admit that subject to the rate of hire being agreed upon they acquiesced in principle to their vessels being chartered by the Government of the Colony but the rate of hire offered by the Government was never accepted by the plaintiffs and consequently the plaintiffs refused from the first to sign the said Charter-party. On receipt of the Colonial Secretary's letter of the 5th October 1918 they gave possession of their vessels having no option in the matter but they deny that the vessels were requisitioned with their consent.

3. As to paragraph 5 of the Defence and Counter-claim the plaintiffs will submit:—

- (i) that neither the New Ministries and Secretaries Act 1916 nor the Defence of the Realm Acts nor the Regulations passed under the Defence of the Realm Acts have any application to this Colony.
- (ii) Alternatively, if the New Ministries and Secretaries Act applies to this Colony the plaintiffs' vessels were not requisitioned by the Shipping Controller.
- (iii) Alternatively, if Regulation 39 BBB of the said Regulations applies to this Colony, their vessels could only be taken subject to the payment of compensation.

4. The said Charter-party which the plaintiffs were invited to sign as aforesaid purporting as it did to requisition not only the said vessels but the services of the owners went beyond the powers conferred upon the Shipping Controller by the said Regulation 39 BBB.

The plaintiffs will therefore submit that the said Circular, the Charter-party and the said letters dated respectively the 16th and 30th April, 1918 were *ultra vires*.

5. In further reply to paragraph 5 of the Defence the Plaintiffs will submit:—

- (a) that if and so far as His Majesty's Royal Prerogative extends to this Colony the exercise of it in relation to the requisitioning of ships has been limited and defined by the Order in Council of the 26th October 1896.
- (b) that the impressment of ships without compensation is illegal by statute.
- (c) that the Crown was not entitled as of right, either by virtue of the Royal Prerogative or under any statute to take possession of the said vessels without paying compensation, that the payment of compensation is a matter not of grace but of legal obligation, and that the amount in the absence of agreement should be fixed by this Honourable Court. The Plaintiffs will also contend if necessary that the provisions of clauses 12 and 13 of the

Order in Council dated the 26th October, 1896 so far as they purport to deprive persons whose property is requisitioned of the right to a judicial decision of the amount of compensation due to them are *ultra vires* and illegal.

6. As to paragraph 10 of the Defence the plaintiffs admit that the Government offered "ex gratia" to compensate them by allowing rates of hire in accordance with the Liner Requisition Scheme. The said rates were fixed in the United Kingdom by agreement between the Government (acting through the Admiralty Transport Arbitration Board) and the shipowners of the United Kingdom whose ships had been requisitioned by the Shipping Controller, and such agreement was not binding on the plaintiffs who were not parties to it. The plaintiffs admit that they declined to accept compensation on the footing of the said Liner Requisition Scheme.

7. As to the Counterclaim (paragraph 14) the plaintiffs deny that the said nine vessels were under requisition between the 1st May, 1918 and the date of the delivery thereof to Quah Beng Kee and they repeat paragraphs 1—6 hereof inclusive.

8. Alternatively, if it should be held that the said 9 vessels were in fact under requisition during the period aforesaid compensation would still be payable by the Government in respect thereof and the amount of such compensation is equivalent to the profits actually made by the plaintiffs upon the running of the said nine vessels during the said period.

9. Save as aforesaid and save in so far as the Defence contains admissions the plaintiffs join issue.

Delivered this 18th day of December, 1919 by Braddell Brothers, Plaintiffs' Solicitors.

Roland Braddell (P. Simpson with him) for the plaintiffs. He pointed out the paragraphs of the Statement of Claim admitted by the defendant; and said that, as stated in the correspondence between the respective solicitors, Counsel for the Attorney-General would not now contend that there was any power to requisition the ships under the New Ministries and Secretaries Act or the Defence of the Realm Act Regulations nor was there any under the Royal Prerogative. The counter-claim by the Attorney-General was also abandoned. The plaintiffs would abandon the argument set up in the reply that the compensation provisions of the Order in Council of 1896 were *ultra vires*. The Attorney-General, further now admitted that the plaintiffs were entitled to a declaration that they were entitled to compensation. The dispute in the case was as to the method of assessment of such compensation and the basis upon which it was to be calculated.

The Statement of Claim disclosed sufficiently a trespass but in order to put the matter beyond doubt he applied formally further to amend the reply.

Upcott for the defendant consented. The further amendment was as follows:—

FURTHER AMENDED REPLY AND DEFENCE TO COUNTER-CLAIM.

"5. (d) Alternatively that the said vessels were not requisitioned by virtue of the Order in Council dated the 26th October, 1896 nor was the said Order complied with and that the requisition was tortious."

Roland Braddell continued.

By Royal Proclamation of August 3rd, 1914, the Admiralty was vested with power to requisition and take up ships within the British Isles. The Proclamation, however gave no power to take up ships in the Straits Settlements. He cited *The Russian Bank for Foreign Trade v. The Excess Insurance Co., Ltd.* L.R. (1918) 2 K.B. 123.

The Executive Council expressly stated that the Order in Council of 1896 was never acted upon and therefore there was no question of damages being assessed by a Board constituted by the Order in Council.

The refusal of the fiat by the Attorney-General was a denial of justice. The Crown Suits Ordinance XV of 1876 was one for the advancement and the benefit of the public and in such Ordinances the words "may order that right shall be done" mean "shall order." See *Queen v. The Bishop of Oxford*, L.R. (1879) 4 Q.B.D. 245 at pp. 258 and 259 and *passim*; Beal's Cardinal Rules of Interpretation, 2nd Edn. at p. 328. The duty of the Crown Law Officers in England on a petition of right is shown in the following cases—*In Re Nathan*, L.R. 12 Q.B.D. 461; *Dyson v. Attorney-General*, L.R. (1911) 1 K.B. 410; *Pawlett v. Attorney-General*, Hardres' Rep. at p. 469; *Monckton v. Attorney-General*, 2 Mac. & G. 402; *Ryves v. Duke of Wellington*, 9 Beav. 579.

The plaintiffs' right to bring this action, after the refusal of the fiat was not only based upon the Magna Charta and the Statute of Northampton but was governed by *Dyson v. Attorney-General* (*supra*). The duty of the executive to assist in the administration of justice was laid down by the Privy Council in *The Eastern Trust Co. v. Mackenzie, Mann & Co.*, L.R. (1915) A.C. 750.

The Attorney-General once having admitted the jurisdiction of the Court to make a declaratory order for compensation under the Order in Council of 1896 it is not open to him to raise any objection to the Court's jurisdiction.

The Government never claimed to act under the Order in Council of 1896. On that disclaimer they refused the Petition of Right and the present action was brought. The Attorney General is now estopped from relying upon the Order in Council.

There was here a clear case of election by the Crown. The letter disclaiming the Order in Council was written by a responsible officer ex-

pressing a statement by the Executive Council. The observations of Lord Sumner in the *Attorney-General v. de Keyser's Royal Hotel*, L.R. (1920) A.C. at 557 as to election by the Crown do not apply except inferentially in our favour.

The Crown must satisfy the Court that it acted under the Order in Council and acted legally under it. The Order in Council gives no power to the Governor to take ships but to requisition their supply. See paragraphs 6 and 16 of the Order in Council.

As to the nature of the Preogative to take ships it is necessary to observe that it is peculiar to the Crown but the King may and does delegate the exercise of it to proper officers and in the Crown Colonies to the Governor. See Halsbury's Laws of England Vol. VI pp. 371 and 372. In this Colony the Royal Prerogative of mercy is the only one delegated to the Governor. The exact nature of the King's Prerogative to take ships will be found in the judgment of Duke, L.J., in *Attorney-General v. de Keyser's Royal Hotel*, *supra*, pp. 250 and 251.

There was no possible justification for the action of the Government and they are trespassers.

Emergency legislation, of which the Order in Council is a part, must be strictly construed. *Wilcock v. Booth*, 122 L.T. 678 at p. 681. Moreover the powers of the Governor must be strictly construed for he is a delegate and nothing should be read into his powers; they must be clearly and expressly given.

The maxim that "the King can do no wrong" has no application to this Colony.

The liability of the Government as trespassers is dealt with in the judgments of the Privy Council in *Wemyss v. Attorney-General of the Straits Settlements*, L.R. 13 A.C. 192 at p. 197.

Upcott for the defendant advanced 3 propositions—

- (1) The present action does not lie as for a trespass
- (2) The plaintiffs acquiesced in the taking of the ships apart from the rates.
- (3) The taking of the ships can now be justified under the Order in Council, 1896.

The plaintiffs' only remedy is by way of Petition of Right. Sections 18 and 57 of Crown Suits Ordinance, 1876. If the fiat is refused, there is no remedy except by an appeal to Parliament which is admitted to be the law in England.

Plaintiffs base their case on *Dyson v. Attorney General*, L.R. [1911] 1 K.B. 410 but this is really an authority to show that a declaratory action does not lie to enforce a pecuniary claim against the Crown. *Vide* the judgment of Farwell, L.J. at pp. 421 and 422.

Hodge v. Attorney General, 3 Y. & C. Ex. 342 and *Pawlett v. Attorney General*, Hardre's Rep. at p. 469 are applicable where the direct estate of the Crown was not affected.

The case of *The Bombay & Persia Steam Navigation Co., Ltd. v. Maclay*, L.R. (1920) 3 K.B. 402 shews that you cannot use a declaratory action to prejudice a petition of right. The plaintiffs ask for a declaration now so as to put in a future petition of right. They wish to be in a position to say that the Court has already decided the point of trespass, so that the petition must receive a fiat. That would reduce a petition of right to mere machinery and render the high discretion of the Executive Council nugatory.

[His Lordship—It is quite clear that in ordinary cases this action would not lie but it is said that in the special circumstances the action will lie.]

Upcott—What are the special circumstances?

[His Lordship—The refusal of the fiat.]

That petition was not for a trespass.

Roland Braddell—We rely on the whole conduct of the Government since February, 1918 including the very arguments now being put forward.

Upcott—A compensation claim and a claim for trespass are fundamentally different.

There is no authority for saying that the right to bring the action is enlarged by any previous refusal of the fiat. The proposition of law which governs the case is that you can never have a declaratory action where a petition of right, if granted a fiat, would lie. *The Eastern Trust Company v. McKenzie, Mann & Co. Ltd.*, L.R. (1915) A.C. 750 and *The Esquimalt & Nanaimo Rly. Co. v. Wilson & anor.*, L.R. (1920) A.C. 358.

[His Lordship: If the fiat is refused, is there no remedy?]

Upcott—That depends on the true construction of section 19 (2) of the Crown Suits Ordinance. If "may" really means "shall," then I suppose the petitioner could get a mandamus against the Executive Council.

The plaintiffs' claim to read "may" as "shall" is highly disputable. It is certainly not to be solved by merely citing *Queen v. The Bishop of Oxford*, L.R. (1879) 4 Q.B.D. 245.

The plaintiffs are involved in this peculiar difficulty that with one breath they say there is an obligation to fiat and with the next that there is no method of compelling that fiat.

[His Lordship:—Is this an action against the Crown?]

Upcott—In substance this is a money claim against the Treasury. This case does not call for a decision as to whether there is an obligation to fiat a petition of right or not. The Legislature with the knowledge of the immemorial English law uses a word *prima facie* permissive.

[His Lordship:—That is true as to English law but in point of fact the Attorney General never does refuse a fiat.]

Upcott—The purely legal view of it is that he can. If the law here was intended to be altered, one would expect the word "shall" to have been used and more significant still one would have expected some procedure to be laid down to deal with the case of a refusal of the fiat.

[His Lordship:—No: I do not think that necessary. How about a Secretary of State refusing a statutory duty in England?]

Upcott—A mandamus could issue against him but I understand that the plaintiffs will argue that a mandamus does not lie against the Executive Council here. Therefore, if that is so, it is a strange omission that procedure was not provided for on the refusal of a fiat. This all points to "may" being merely permissive.

The Petition of Right and the Statement of Claim in this action shew that the requisition is admitted to have been made. Right from February until far on in this action trespass was never raised. Either the plaintiffs have waived trespass or they have acquiesced in it. If the writ is waived, then the Order in Council is the only lawful origin for the requisition.

The Government thought the English legislation to be applicable to this case. The petition of right was met by wrongly relying on the Prerogative and by wrongly disclaiming the Order in Council. But *de facto* possession was taken by the Crown and as a result of a scheme appointed by the Shipping Committee. The Shipping Committee made the requisition under powers delegated to them under the amending Order in Council.

In any case the Order in Council does not require any written authority from the Governor to take possession of the ships. As there was a *de facto* taking, it must be referred to a lawful origin.

The omission of the word "ships" from the Order in Council was a misprint or a slip.

Roland Braddell—I call for the original Order in Council sent out here.

Upcott—I undertake to have it looked up. The words "other property" are *ejusdem generis* with "boat" and so include "ships".

The Court does not question whether a thing is necessary for the defence of the Realm if the Executive says that it is so.

The defendant submits to a decree as in the letter of April 1st, 1920, already referred to.

The counterclaim is abandoned.

Roland Braddell in reply.

Cur. adv. vult.

BARRETT-LENNARD, J.—This is an action against the Attorney General as the representative of the Crown claiming:—

- (1) A declaration that the plaintiffs are entitled to compensation for the unauthorised expropriation by the Crown of nine steamships belonging to the plaintiffs.
- (2) A declaration that the plaintiffs are entitled to compensation in respect of the unavoidable deterioration of certain marine stores left in their hands when such expropriation took place, and
- (3) A declaration that the plaintiffs are entitled to have such compensation assessed by or under the direction of the Court.

The Attorney General confesses the right of the plaintiffs to declarations (1) and (2). The answer made to the prayer for declaration No. 3 is that the steamships were requisitioned by the Governor in exercise of the power for that purpose vested in him by clause 6 of an Imperial Order in Council dated October 26, 1896, which was published in this Dependency on August 6, 1914, and that under clause 13 of such Order any compensation due to the plaintiffs must be assessed by a Board consisting of five persons, of whom one shall be a Judge or Stipendiary Magistrate two shall be Officers, either in the Service of the Civil Government, or His Majesty's Naval or Military Service, and the other two shall be inhabitants of this Dependency. The plaintiffs' counsel stated that no objection would probably have been raised to the tribunal described if the Chairman of it had been one of the Judges of this Court. But the learned counsel intimated that the plaintiffs will not voluntarily refer their claims to such a Board as the Government constituted.

It follows that the real question is whether the plaintiffs can obtain the relief which they seek in the present proceedings. I have never doubted that, in the absence of the special circumstances to be hereafter mentioned, the procedure, and the only procedure, open to the plaintiffs would have been a Petition of Right in the form given in one of the Schedules to the Crown Suits Ordinance 1876. An examination of Section 18 of the Ordinance and of the case of *The Attorney General v. Wemyss* (13 A.C. 192) will shew that a Petition of Right is applicable when the relief claimed or prayed for is for the restitution of any corporeal right or a return of lands or chattels or a payment of money or damages founded on some wrong or injury done. With reference to the last branch of this proposition it is the case that the Crown in many Colonies has always undertaken works which in England were counted among the activities of private persons, and therefore the Secretaries of State or other responsible Ministers have, in framing or suggesting legislation, thought it right to deprive the Crown of that immunity for torts committed by its servants which it enjoys at Common Law. Nevertheless no modern case can be produced which illustrates the grant of the necessary relief otherwise than upon a Petition of Right.

An ordinary action against the Attorney General of this Dependency can only be instituted in cases falling within Section 57 of the Crown Suits Ordinance. These are all cases in which a Petition of Right is not applicable and the Crown is brought before the Court, the Attorney General, as representing the interests of the Crown, being made a defendant. According to the present practice no Order is ever made in an ordinary action requiring the Crown to do any act. The Court simply declares that the Crown is, or

is not, entitled to certain property, or that a Will or Settlement does, or does not, create a charitable trust, or that the Crown can, or cannot, insist that a particular thing be done.

I quite realise that what I have stated was not perhaps the practice followed in the old Court of Chancery. Cases like *Pawlett v. The Attorney General* (Hardres 465) point to the conclusion that a Petition of Right claiming equitable relief was not at one time heard by the Court of Chancery. Bills were exhibited against the Attorney General and declarations, having all the effect of Orders, were regularly passed. It may be that Petitions were supposed to be confined to matters of which the Common Law Courts took cognisance, or that the Lord Chancellor, who endorsed the Petitions did not care to name his own Court, of which—for a very long period—he was the sole Judge. Be this as it may, I know that no lawyer to-day ever seeks, either directly or indirectly, to recover, or get possession of, anything under the dominion of the Crown except by way of a Petition.

Now, the result of the third declaration sought, if made will be to deplete the coffers of the Crown, and on this ground I came to the conclusion above expressed. The special circumstances, to which I have alluded, are as follows. A Petition of Right was presented to the Governor on December 10, 1918. No acknowledgment of it was given until February 22, 1919. On that day the Acting Colonial Secretary (Mr. W. George Maxwell) wrote to the plaintiffs' solicitors: "I am directed to inform you that, as your clients' ships have been requisitioned by the Crown by virtue of the Royal Prerogative and not under the Defence Order in Council 1896, your clients are not entitled to compensation to be assessed by a Board to be appointed under the said Order in Council, and indeed are not legally entitled to any compensation at all. The Crown, however, is willing to pay *ex gratia* to your clients a sum by way of compensation based on the rates of hire payable to those owners who have signed the Liner Requisition Charter-Parties.

"2. Under the circumstances the Governor in Council does not see his way to endorse as prayed your clients' Petition of Right."

The Crown consistently refused until after the institution of this action to recognise any duty of perfect obligation towards the plaintiffs. The Attorney General, on behalf of the Crown, now admits that there never was the slightest justification for citing the prerogative, or refusing the fiat or for assuming that the Crown was not bound to pay for the use of the ships. In other words, a fiat upon a Petition presented with a view to obtaining payment of compensation would now be granted as of course. In these circumstances the use of a Petition would be an idle ceremony.

Further, I am of opinion, to use some of the language of Baron Atkyns in *Pawlett v. The Attorney General*, that it would derogate from the King's honour to imagine that he, as the fountain and head of justice and equity, could possibly desire his subjects, already smarting under grave injustices, to change the headings of their cause-papers and start proceedings as of right afresh. In connection with this topic it is right to notice three arguments.

First, it was said that the Petition presented in December, 1918 merely referred to the Imperial Order in Council and that the plaintiffs in this action deny the application of such Order and allege that the Crown acted in a manner wholly unauthorised by any rule of law or equity. From these premises the conclusion drawn was that the Governor in Council never refused to fiat the prayers now before the Court. Whatever may have been the merits of such an argument in the age of formalism, it is to-day unworthy of serious consideration, and is not the type of argument which this Court expects to hear on behalf of the Crown. It is within the knowledge of the pupil-room that the Court can amend any Petition or other pleading so as to do right between the parties. And this is the only answer it is necessary to give.

Secondly, it was contended that the Governor in Council has an entire discretion as to whether he will fiat a Petition and that this Court cannot directly or indirectly review his decision. Section 19 of the Crown Suits Ordinance enacts that the Petition shall be considered by the Governor in Council, who, if it appears to him that the claim is a *bona fide* claim which cannot be amicably settled, may order that right shall be done. The question whether the word "may" imposes an imperative obligation or creates a mere power has been debated in our Courts on very many occasions. The rule to be extracted is stated by Lord Cairns in *Julius v. The Bishop of Oxford* (5 A.C. 214 at 225). He said "My Lords, the cases to which I have referred appear to decide nothing more than this: that where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise that power ought to be exercised, and the Court will require it to be exercised." The foregoing statement is the one which, until instructed by superior authority, I shall accept as representing the true doctrine. It indicates, I think, that, if a claim is made in good faith and cannot be amicably settled, the petitioner has an absolute right to the fiat. To cite English practice under 23 and 24 Vict. chapter 34 is beside the mark. Section 2 of the Imperial Act is as follows:—

"The . . . Petition shall be left with the Secretary of State for the Home Department, in order that

the same may be submitted to Her Majesty for Her Majesty's gracious Consideration, and in order that Her Majesty, if she shall think fit, may grant Her Fiat that Right shall be done."

Here, the Crown's chief executive officer grants the fiat, and obviously he is in a widely different situation to the great personage who actually executed the office of the Crown. I may add, however, that in England a fiat is never refused on the ground that the petitioner is very unlikely to succeed. It is granted at the instance of every person who prefers a case in good faith, and the legal aspects of it are determined by the Courts and not by the Attorney General. This is in accord with the spirit of lofty impartiality which has in modern English gained for that wonderful creation of the law, called the Crown, the millions who owe it allegiance.

The third argument was that the plaintiffs ought to have applied for the enforcement of the duty to grant the fiat, assuming, of course, that such a duty existed. The exact nature of the application was not specified, but I gathered that it ought to have been, for the issue of the prerogative writ of mandamus. I think that the contention is sufficiently answered by an earlier portion of this judgment.

I pass to the question whether the Crown can found on the Order in Council of the 26th of October, 1896, or on an amending Order dated 21st of March, 1916 and published here on the 20th of the following May. Though the plaintiffs, by their pleadings impeach the validity, in point of law, of clauses 12 and 13 of the Order of 1896, it was assumed that the two Orders are still in force for all purposes. The notion that the Crown, in the exercise of the prerogative, can, during a period of peace, subject the inhabitants of a British Dependency to an obligation wholly at variance with the fundamental concepts of our constitution is so startling that I should be slow in yielding assent to it. It is not, however, necessary to reach any conclusion upon the point for three reasons.

First, the plaintiffs' ships were expropriated on the 5th of October, 1918, when this Empire most certainly was at war, and the legislation no doubt justified. Thus it may very well be that if such ex-proprietion were lawful, the resulting claim for compensation ought to be assessed in the manner mentioned in clause 13 of the Order of 1896.

Secondly, I am of opinion that the plaintiffs' ships never were expropriated in exercise of any powers conferred upon the Governor of this Dependency.

Thirdly, and in the alternative the Crown is not now at liberty to invoke clause 13 of the Order of 1896. Clause 6 enacts: "The Governor may require any person to supply any animals, vehicles, ships, boats, or other personal property

belonging to or under the control of such person, to the Government, if such property be required in aid of or in connection with the defence of the Colony, and in default of the person supplying the same, may seize and take possession of and retain any such animals, vehicles, boats, or other personal property for such purposes." Clause 4 of the amending Order enables the Governor to delegate the power above set out to the naval or the military authorities in the Colony. The notice of the intention to seize the plaintiffs' ships is contained in a letter in the subjoined form. It is addressed to the plaintiffs' Managing Director and is signed by the Colonial Secretary, Mr. F. S. James.

"Sir, In view of the refusal of your Directors to sign the Charter-party under the "Liner Requisition Scheme" I have to give you notice that as from the 7th instant your vessels

s.s. Pungah	s.s. Perak	s.s. Perlis
s.s. Jin Ho	s.s. Renong	s.s. Trang
s.s. Omapere	s.s. Pin Seng	s.s. Ghirbi

will be removed from your management and in future be run and managed by Mr. Quah Beng Kee.

"2. You will, therefore, hand over all necessary documents and supply all information to that gentleman, as he may require."

This is not such a notice as the Orders in Council contemplate. Persons whose property was about to be seized had an absolute right to a notice or other document signed by the Governor, or by one of the persons mentioned in the amending Order in Council, and containing a recital or reference to clause 6 of the Orders in Council. In my opinion it was incumbent on the Governor to pursue strictly the authority given to him.

With reference to my third proposition, the Governor in Council, in order to place the plaintiffs entirely at the mercy of the Crown, deliberately elected to waive any possible title traceable to the Orders in Council. In my opinion that election cannot now be ignored in order to force the plaintiffs before a Board to the constitution of which they object. I have now disposed of all the defences.

In my opinion the plaintiffs are clearly entitled to the three declarations which they seek and to the costs of this action. The plaintiffs urge that the first declaration should be prefaced with an expression of opinion on the part of the Court that the Crown wrongfully trespassed upon and converted the nine ships to its own use. There is no occasion for any expression of opinion in the formal Order as to the ground on which the liability to pay compensation rests. The plaintiffs do not suggest that the measure of the compensation depends in any way upon the errors made by Officials. Therefore, the question as to

whether such acts were tortious or innocent is in this action, of academic interest only. But if the plaintiffs had sued persons who purported to act under Governmental authority, it would have been of the greatest importance from the point of view of such persons to establish that the seizure was not *in invitum*. For this reason, I abstain from expressing the view which I have formed upon the point.

Before parting with the case, I think it desirable to comment on two matters. First, there would, probably, have been no trial at all had the Colonial Secretary shewn wisdom and toleration during the negotiations with the plaintiffs' Board of Directors. His view as to the rights of the Crown was quite unfounded, and yet he sought to enforce it by language and other conduct calculated to outrage the feelings of the gentlemen in question and to awaken great anxiety as to whether adequate compensation ever would be paid. As to the official attitude subsequent to the seizure of the ships, the best comment, perhaps, is that the Attorney General's advocate has not advanced one word in defence of it. This brings me to the last matter. I noticed, not with surprise, but with regret, that neither of the Law Officers thought it incumbent on him to appear at the bar. Now, according to an usage grown venerable with age and not lightly to be broken-in upon, the highest Courts in England and in every British Dependency expect that the Attorney General will conduct before them cases to which the Crown is a party, if of great public importance or difficulty. It is not in my opinion consistent either with the dignity of this Court or with that of the Government that the ancient practice to which I have referred should be neglected. But I hope it will never be imagined that the Court is not sensible of the debt which it owes to those advocates in private practice who discharge the forensic duties of the present Law Officers. The Court is fully satisfied as to their capacity, but is of opinion that their presence alone in important Crown cases is hardly consistent with the spirit of our constitution.

Judgment accordingly.

On Wednesday, the 24th August, 1921, Mr. M. J. Upcott mentioned the case, saying that a correction appeared to be necessary in the judgment. He pointed out that in the judgment, in declaration 2, it was stated that compensation in respect of deterioration of 10,000 tons of coal laid in for the requisitioned steamers was allowed. In the original Statement of Claim, in declarations 1 and 2, there was no mention made of coal, nor was it mentioned in the amended Statement of Claim. The declarations merely mentioned compensation for the use of the said steamers and loss and damage occasioned in the use thereof, to be assessed by such person or persons as the Court

might direct. The question of coal involved a large sum of money. No argument or discussion was directed to the point. The coal was not requisitioned. The plaintiffs said that the coal without the ships was worth very much less than the coal with the ships. Unwittingly, he thought, the declaration regarding the coal would seem to prejudice the matter. He merely wished to find out the intention of the Court. If it was merely a slip, the position could be met by merely striking out declaration 2 and numbering declaration 3 declaration 2. It would then be a point whether this loss in respect of coal was really a damage by the requisition of the ships.

Mr. Roland Braddell agreed to this course.

His Lordship corrected the judgment accordingly.

Solicitors for the Plaintiff—*Braddell Bro-Solicitors* for the Defendants—*Drew & Napier*.

[APPELLATE CIVIL JURISDICTION]

PRITCHARD, J.,

STEVENS and DINSMORE, JJ.

September 2, 1929.

LAU TAI THYE *alias* LAU TAI TAI *alias* LAU THYE THYE *alias* TAI THYE. Plaintiff.

(Respondent)

and

LEONG YIN KHEAN & OTHERS....Defents.
(Appellants)

[PENANG CIVIL APPEAL No. 11 of 1927]

Administration—claim for declaration of Status as secondary wife and for share in widow's one-third share on intestacy—laches and long acquiescence—limitation—Ordinance No. 56 (Limitation), Art 97.

The plaintiff-respondent claimed to be one of the secondary wives of a Chinese gentleman named Cheang Ah Quee who died in 1901. In certain proceedings instituted in 1912 it was declared that there was an intestacy as to certain parts of the income of the deceased's estate. In 1915 the Registrar, acting under an Order of Court directing an inquiry as to the deceased's next-of-kin, made his certificate and found four persons entitled to rank as widows of the deceased. There was no mention of the respondent's name in the certificate. There was no mention of the respondent's name in the certificate. It appeared from the evidence that the plaintiff-respondent must have known by the end of 1915 that her claim was being canvassed and that the Courts of the Straits Settlements were prepared to entertain claims by secondary wives of the deceased. At the end of 1919 one Tan Ah Loy who also claimed to be a

The cases of *Then Kang Chu v. Tan Kim Hoe*, (1926) S.S.L.R. 1 and *Meyer v. Meyer*, (1926) S.S.L.R. 24, appear not to have been cited. The report however is considered of sufficient interest for publication on the questions of laches and limitation.

secondary wife of the deceased succeeded in establishing in the Privy Council her right as such to a distributive share in his estate. The plaintiff-respondent, however, took no steps whatever to put forward her claim until the year 1924 long after the funds of the estate had been distributed.

Held, by the Court of Appeal (Prichard Stevens, JJ., Dinsmore, J. dissenting) that the plaintiff-respondent was debarred by laches and long acquiescence from prosecuting her claim.

Held further, that the claim being *imprimis* one for a declaration of status as a secondary wife, the suit fell within the terms of Article 97 of the Schedule to Ordinance No. 56 (Limitation), and was barred because it had not been brought within 6 years from the date when the claim might have been preferred.

APPEAL from the Judgment of Sproule, J., dated the 2nd September, 1927, declaring that the plaintiff-respondent was a secondary wife of Cheang Ah Quee deceased and entitled to share in the widow's one-third share of income as to which the deceased died intestate, as from the 6th August, 1912.

The facts appear from the Judgment of Stevens, J. and for the purposes of this report may be sufficiently gathered from the head-note.

Terrell for 1st—4th Appellants.

Saunders for 5th Appellant.

J. Crabb-Watt for Respondent.

The Court of Appeal (Prichard, J., Stevens & Dinsmore, JJ.) unanimously allowed to appeal and proceeded to deliver the following written Judgments thereon later.

6-12-1929

PRICHARD, J.—In this appeal the Court in a verbal judgment agreed with the finding of the learned Judge that the Respondent had been a lawful secondary wife of Cheang Ah Quee deceased and that she was consequently now one of the lawful widows, but it considered that her claim was barred by the Limitation Ordinance and by acquiescence.

Cheang Ah Quee died on the 13th December 1901 and an intestacy as to certain portions of the income of the estate was declared in Suit No. 261 of 1912. On the 5th June 1914 an inquiry was ordered as to the testator's next of kin, and on the 27th June 1914 a notice was published in the local newspapers directing that all claimants should attend and prove their claims on the 25th August 1914.

Section 976 of the Civil Procedure Code enacts:—

"Where a judgment or order is given or made, whether in Chambers directing an made, whether in Court or in Chambers directing an account of debts, claims, or liabilities, or an inquiry for next-of-kin or other unascertained persons, unless otherwise ordered all persons, who do not come in and prove their claims within